



In re BERNARD L. MADOFF, :  
 :  
 Debtor . :  
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**OBJECTION TO TRUSTEE'S MOTION FOR AN ORDER TO SCHEDULE  
HEARING ON "CUSTOMER" ISSUE AS IT RELATES TO ERISA**

The following entities ("ERISA Plan Objectors"), by and through their undersigned counsel, hereby file a limited objection to the Trustee's Motion for an Order to Schedule Hearing on "Customer" Issue as it Relates to ERISA, dated October 4, 2011 ("ERISA Scheduling Motion"):

Bricklayers and Allied Craftsmen Local 2 Annuity Fund, Bricklayers and Allied Craftworkers Local 2, Albany, New York, Health Benefit Fund, Bricklayers and Allied Craftworkers Local 2, Albany, New York, Pension Fund, Building Trade Employers Insurance Fund, Central New York Laborers' Annuity Fund, Central New York Laborers' Health and Welfare Fund, Central New York Laborers' Pension Fund, Central New York Laborers' Training Fund, Engineers Joint Welfare Fund, Engineers Joint Training Fund, International Brotherhood of Electrical Workers Local Union No. 43 and Electrical Contractors Pension Fund, International Brotherhood of Electrical Workers Local No. 43 and Electrical Contractors Welfare Fund, I.B.E.W. Local 139 Pension Fund, I.B.E.W. Local 241 Pension Fund, I.B.E.W. Local 241 Welfare Benefits Fund, I.B.E.W. Local 325 Annuity Fund, I.B.E.W. Local 325 Pension Fund, I.B.E.W. Local 910 Annuity Fund, I.B.E.W. Local 910 Pension Fund, I.B.E.W. Local 910 Welfare Fund, I.B.E.W. Local 1249 Pension Fund, Laborers' Local 103 Annuity Fund, Laborers' Local 103 Welfare Fund, Laborers' Local 103 Pension Fund, New York State Lineman's Safety Training Fund, Oswego Laborers' Local No. 214 Pension Fund, Plumbers, Pipefitters and Apprentices Local No. 112 Health Fund, Roofers' Local 195 Annuity Fund, Roofers' Local 195

Health & Accident Fund, Roofers' Local 195 Pension Fund, Syracuse Builders Exchange, Inc./CEA Pension Plan, SEIU 1199Upstate Pension Fund, Service Employees Benefit Fund, Service Employees Pension Fund of Upstate New York, Local 73 Retirement Fund, Local 73 Annuity Fund, and Upstate Union Health & Welfare Fund.

In support of their objection, which is filed on this date pursuant to an extension of time granted by Counsel for Irving H. Picard, trustee for the substantively consolidated liquidation of BLMIS ("Trustee"), ERISA Plan Objectors state as follows:

### **BACKGROUND**

1. ERISA Plan Objectors are Taft-Hartley employee benefit plans governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461.

2. ERISA Plan Objectors were "customers" of Bernard L. Madoff Investment Securities ("BLMIS") under the Securities Investor Protection Act ("SIPA"), 15 U.S.C. §§ 78aaa-78lll, by virtue of having entrusted their ERISA plan assets to BLMIS through one or more ERISA plan asset vehicles.

3. ERISA Plan Objectors timely filed the following customer claims ("Claims") against the estate of BLMIS under SIPA:

<b><u>ERISA Plan Objector</u></b>	<b><u>Claim No.</u></b>
Bricklayers and Allied Craftsmen Local 2 Annuity Fund	006062 005984
Bricklayers and Allied Craftworkers Local 2, Albany, New York Health Benefit Fund	006061 006003
Bricklayers and Allied Craftsmen Local 2 Pension Fund	005983
Building Trade Employers Insurance Fund	005165
Central New York Laborers' Annuity Fund	005075

	004974
Central New York Laborers' Health and Welfare Fund	005163 005160
Central New York Laborers' Pension Fund	005070 005077
Central New York Laborers' Training Fund	005076
Engineers Joint Welfare Fund	005572 005559
Engineers Joint Training Fund	005573
International Brotherhood of Electrical Workers Local Union No. 43 and Electrical Contractors Pension Fund	005837 005835
International Brotherhood of Electrical Workers Local Union No. 43 and Electrical Contractors Welfare Fund	005836
I.B.E.W. Local 241 Welfare Benefits Fund	005468
I.B.E.W. Local 139 Pension Fund	005422
I.B.E.W. Local 241 Pension Fund	005467
I.B.E.W. Local 325 Annuity Fund	006585
I.B.E.W. Local 325 Pension Fund	006572
I.B.E.W. Local 910 Annuity Fund	005414
I.B.E.W. Local 910 Pension Fund	004801
I.B.E.W. Local 910 Welfare Fund	005415
I.B.E.W. Local 1249 Pension Fund	006901
Laborers' Local 103 Pension Fund	005964
Laborers' Local 103 Annuity Fund	005966 005965
Laborers' Local 103 Welfare Fund	005975

New York State Lineman's Safety Training Fund	005003
Oswego Laborers' Local 214 Pension Fund	006284 005411
Plumbers, Pipefitters and Apprentices Local No. 112 Health Fund	005503
Roofers' Local 195 Pension Fund	004336
Roofers' Local 195 Annuity Fund	004333 004334
Roofers' Local 195 Health & Accident Fund	004332
Syracuse Builders Exchange, Inc./CEA Pension Plan	005164
SEIU 1199 Upstate Pension Fund	005810
Service Employees Benefit Fund	005574
Service Employees Pension Fund of Upstate New York	006161 006160
Syracuse Builders Exchange, Inc./CEA Pension Plan	005162
Local 73 Retirement Fund	005463 005897
Local 73 Annuity Fund	005895
Upstate Union Health and Welfare Fund	005949

4. On December 8, 2009, and December 17, 2010, the Trustee issued "Notice[s] of Trustee's Determination of Claim" denying the ERISA Plan Objectors' Claims. Each such notice stated:

Based on a review of available books and records of BLMIS by the Trustee's staff, you did not have an account with BLMIS. Because you did not have an account, you are not a customer of BLMIS under SIPA as that term is defined at 15 U.S.C. § 7811l (2). Accordingly, your Claim for securities and/or a credit balance is DENIED.

5. ERISA Plan Objectors timely objected to the Trustee's denial of their Claims, asserting that they were "customers" of BLMIS under SIPA by virtue of having entrusted their ERISA plan assets to BLMIS through one or more ERISA plan asset vehicles. See Dkt. Nos. 1923, 4068, 4070.

6. The Trustee now moves for an order to set a hearing on 54 "customer claims and corresponding objections filed by investors who did not have a BLMIS account in their names, invested only indirectly in BLMIS, and argue that ERISA and related regulations determine their 'customer' status under SIPA ('ERISA Claimants Without An Account')." Dkt. No. 4432 at 2.

7. The ERISA Objectors come within the Trustee's definition of "ERISA Claimants Without An Account," and thus have an interest in these proceedings.

8. In fact, ERISA Plan Objectors are responsible for 50 of the 54 ERISA-based objections that are the subject of this motion (and that will be the subject of the Trustee's prospective substantive motion).

#### **BASIS FOR OBJECTION**

9. ERISA Plan Objectors object to the Trustee's ERISA Scheduling Motion on the ground that it does not provide enough time for ERISA Plan Objectors to obtain, prepare, and submit the "ERISA Documentation" demanded by the Trustee.

10. The Trustee proposes that "[b]ecause a claimant bears the burden of establishing 'customer' status, ERISA Objecting CWAA shall submit to the Trustee documentation (including documents regarding their ERISA plan, BLMIS investment, the proportionate share of the ERISA plan in the BLMIS investment, or any other relevant documents to their claims and objections) in support of the argument that ERISA and related regulations determine their

‘customer’ status (the ‘ERISA Documentation’). The ERISA Documentation should be transmitted to the Trustee no later than [December 14, 2011].” Dkt. No. 4432 at 7.

11. Some of the “ERISA Documentation” requested by the Trustee may not be in the possession of the ERISA Plan Objectors and may be in the possession of third parties, such as the ERISA plan asset vehicles through which the ERISA Plan Objectors’ invested in BLMIS. While the third party ERISA plan asset vehicles have preliminarily agreed to provide any necessary “ERISA Documentation,” ERISA Plan Objectors may need to serve subpoenas on those entities in order to obtain the documentation requested by the Trustee.

12. ERISA Plan Objectors intend to promptly and diligently engage in efforts to obtain all such documentation. If, however, it is necessary to subpoena the third party ERISA plan asset vehicles, and if those parties oppose the subpoenas, it is unreasonable to expect that that discovery dispute will be resolved by December 19, 2011, and that ERISA Plan Objectors can obtain, prepare, and submit the “ERISA Documentation” requested by the Trustee by December 19, 2011.

13. Accordingly, ERISA Plan Objectors object to the proposed deadline of December 19, 2011, and respectfully request a modest extension of four (4) weeks, making the deadline for Opposition Briefs and submission of “ERISA Documentation” January 16, 2012, and extending all subsequent proposed deadlines by a comparable four (4) weeks. (ERISA Plan Objectors initially asked that the Trustee consider an extension of the December 19, 2011 deadline to May 1, 2012 to allow them sufficient time to gather any necessary “ERISA Documentation.” Based on discussions with Counsel for the Trustee, ERISA Plan Objectors are now requesting the modest four (4) week extension.)

14. Given that ERISA Plan Objectors are responsible for 50 of the 54 ERISA-based objections that are the subject of this motion (and that will be the subject of the Trustee's prospective substantive motion), this objection and request for a modest extension of the proposed deadlines should be granted by the Court.<sup>1</sup>

**CONCLUSION**

15. For all of the foregoing reasons, ERISA Plan Objectors object to the Trustee's ERISA Scheduling Motion to the extent that it proposes a deadline of December 19, 2011 for the submission of Opposition Briefs and "ERISA Documentation," and respectfully request that the deadline for Opposition Briefs and "ERISA Documentation" be set for January 16, 2012, and that all subsequent deadlines be adjusted accordingly.

Dated: October 20, 2011

Respectfully submitted,

BLITMAN & KING LLP

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<sup>1</sup> ERISA Plan Objectors strenuously oppose the objection and suggested briefing schedule submitted by the Orthopaedic Specialty Group, P.C. Plan Participants, which seeks to drastically shorten the Trustee's proposed briefing schedule. See Dkt. No. 4462.



**CERTIFICATON**

I, Jennifer A. Clark, hereby certify that on the 20<sup>th</sup> day of October 2011, I electronically transmitted a true and correct copy of the foregoing document, Objection to Trustee's Motion for an Order to Schedule Hearing on "Customer" Issue as it Relates to ERISA, to the Clerk of the Court using the ECF System for filing transmittal of a Notice of Electronic Filing (NEF) to all attorneys of record who are ECF registrants. I also certify that on said date, I caused to be served via e-mail and first class mail, postage pre-paid, a true and correct copy of the aforementioned document on Irving H. Picard, Trustee c/o Baker & Hostetler, LLP, Counsel for the Trustee, 45 Rockefeller Plaza, New York, NY 10111, attention David J. Sheehan, Esq., and the Security Investor Protection Corporation, 805 Fifteenth Street, NW, Suite 800, Washington D.C. 20005, attention Kevin H. Bell, Esq.

BLITMAN & KING LLP

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